Airis Nurhana bt Alfian (an infant suing by her father and litigation representative Alfian bin Zainudin) v Darul Aiman Sdn Bhd & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02(NCVC)(W)-2095–11 OF 2022
MARIANA YAHYA, SEE MEE CHUN JJCA AND FAIZAH JAMALUDIN HCJ
3 OCTOBER 2024

Tort — Negligence — Medical negligence — Whether brachial plexus injury suffered by child during her birth was caused by doctor's negligence — Whether injury was caused by doctor applying excessive traction during vacuum delivery in presence of shoulder dystocia — Whether High Court was plainly wrong in finding both doctor and hospital where she worked to deliver the child not liable for negligence — Whether there was failure on part of trial judge to judicially appreciate the evidence — Whether owner of hospital where delivery took place was vicariously liable for doctor's negligence but could not claim indemnity or contribution from the negligent doctor

The appellant infant was found to have suffered a brachial plexus injury around the region of her left shoulder following her birth in September 2013 at the Putra Medical Centre ('PMC') owned and operated by the first respondent ('R1'). The appellant was delivered by the second respondent ('R2') who was then a medical officer, but not a specialist, employed by PMC in its obstetrics and gynaecology department. The appellant's case was that the brachial plexus injury was caused by R2 applying excessive traction when she carried out vacuum delivery in the presence of shoulder dystocia. Both the respondents denied that shoulder dystocia had occurred during the appellant's birth. They pleaded that vacuum extraction was undertaken to assist in the appellant's birth due to poor maternal effort. R2 also pleaded that vacuum extraction was used because the appellant's mother, NAZ, seemed to be exhausted at the time. Following a trial, the High Court dismissed the appellant's medical negligence suit against the respondents after finding that: (a) the appellant's mother, NAZ, was in a state of maternal exhaustion warranting the use of vacuum extraction in the delivery; (b) shoulder dystocia did not occur during the appellant's delivery; and (c) the appellant's brachial plexus injury was not caused by excessive traction applied by R2 during the vacuum delivery in the presence of shoulder dystocia. The instant appeal was against the High Court's decision both on liability and quantum.

Held, unanimously setting aside the High Court's decision on liability, finding

the respondents liable for the brachial plexus injury suffered by the appellant, holding R1 vicariously liable for R2's negligence, dismissing R1's claim against R2 for contribution and indemnity, affirming the High Court's awards for special damages, pre-trial damages and general damages and partly allowing the appeal against the High Court's awards for future general damages:

(1) The High Court judge was plainly wrong, for the following reasons, in finding that there was maternal exhaustion warranting R2 to undertake vacuum delivery of the appellant: (a) the trial judge failed to take into account that both the respondents had pleaded that vacuum extraction was undertaken to assist in the appellant's birth because of NAZ's 'poor maternal effort' and not because of 'maternal exhaustion'; (b) nowhere did R2 plead or state in her witness statement that she had used vacuum extraction because of 'maternal exhaustion'. The trial judge's finding that there was 'maternal exhaustion' to warrant vacuum delivery was based solely on R2's oral evidence where she stated, 'my clinical judgment, I saw she is exhausted'; (c) the trial judge failed to take into account NAZ's consistent statement during her testimony that at the time of the delivery she was not tired and that R2 had never asked her whether she was exhausted or tired before R2 decided to undertake vacuum extraction of the appellant; (d) nowhere did R2 say that she had checked or asked NAZ whether she was tired or exhausted before making the decision to undertake the vacuum extraction. The evidence showed that the phrase 'maternal exhaustion' was first mentioned in an undated medical report prepared by R2 more than five years after the appellant's birth for an internal inquiry by PMC held on 19 January 2018. The claim that there was 'maternal exhaustion' was never recorded in the contemporaneous medical records made during, or soon after, the delivery; (e) the trial judge did not take into account the opinion of the appellant's expert (PW1) that NAZ would not have been maternally exhausted after 15 to 20 minutes of pushing; (f) the trial judge did not sufficiently appreciate that the opinion of R2's expert witness (DW4) that the vacuum delivery was undertaken because of maternal exhaustion arose from DW4's mistaken belief (a mistake which she admitted during the trial) that the undated medical report R2 had prepared more than five years after the appellant's birth was part of the contemporaneous medical records of the delivery (see paras 12–16, 19–18 & 23–25).

(2) The trial judge was plainly wrong, for the following reasons, in finding that there was no shoulder dystocia during the appellant's delivery as well as in finding that the brachial plexus injury was not caused or materially contributed by the excessive traction applied by R2 during the vacuum delivery in the presence of shoulder dystocia: (a) the paediatrician at PMC, Dr Marina, who saw the appellant three days after her birth recorded that there was occurrence of shoulder dystocia

on the appellant's left shoulder. This record was part of the contemporaneous medical records made and kept by PMC and was tendered during the trial as part of the respondents' Part B documents, where the authenticity was not disputed but the contents were disputed; (b) the appellant relied upon Dr Marina's note as evidence of left shoulder dystocia three days after the appellant's birth. Since the respondents contended that there was no left shoulder dystocia as recorded by Dr Marina, the onus was on them under s 102 of the Evidence Act 1950 ('the EA') to have called Dr Marina to prove that her assertion was wrong. If no evidence was given by either side, the appellant would succeed as Dr Marina's medical record was not disputed and the respondents' claim that Dr Marina's assertion was wrong would not have been proven. Therefore, the burden of proof was on the respondents to have called Dr Marina; (c) the trial judge did not give any weight to Dr Marina's contemporaneous entry of shoulder dystocia in the medical records because she was not present at the appellant's birth and because the appellant did not call her as a witness. In the light of s 102 of the EA, the trial judge was plainly wrong in deciding that the onus was on the appellant to call Dr Marina to prove that that her entry in PMC's medical records was accurate when it was the respondents who disputed her entry of shoulder dystocia in the medical records; (d) the trial judge was plainly wrong to have decided that the appellant's brachial plexus injury was possibly caused by 'maternal propulsions' when such a cause was neither pleaded by the respondents nor included in the issues to be tried nor stated in any of the medical records or medical reports; (e) in finding that there was no shoulder dystocia during the delivery, the trial judge failed to take into account the opinions of the experts, PW1 and DW4, that brachial plexus injuries not associated with shoulder dystocia were uncommon and that two-thirds of such injuries were associated with shoulder dystocia. The judge also failed to appreciate the evidence of the experts and medical literature that where there was shoulder dystocia, the use of excessive traction through vacuum delivery or forceps extraction might cause brachial plexus injury; (f) the trial judge failed to give reasons as to why she preferred DW4's expert opinion over the expert opinions of PW1 and DW3. It was established law that a court must analyse the expert evidence to determine if it was reasonable or responsible and withstood logical analysis. A court could not state that it preferred the opinion of one expert over the opinion of another expert without giving any reasons for doing so (see paras 33, 36–40, 48, 53, 55 & 58–61).

(3) Based on the evidence before the trial court and the opinions of the medical experts, the court found that the brachial plexus injury suffered

by the appellant was caused or materially contributed by excessive traction applied by R2 during vacuum delivery in the presence of shoulder dystocia (see para 63).

(4) R2 was negligent in her treatment of the appellant and NAZ during labour and in her delivery of the appellant. R2 owed a duty of care to both of them and she breached that duty of care by undertaking vacuum delivery when there was no maternal exhaustion to warrant its use, and by using excessive traction in the presence of shoulder dystocia. By reason of her breach of the duty of care, R2 caused the appellant to suffer the brachial plexus injury (see para 64).

(5) Applying the criteria for imposing vicarious liability promulgated by Lord Phillips in *Various Claimants v Catholic Child Welfare Society and others* [2013] 2 AC 1, as further explained and elaborated in *Cox v Ministry of Justice* [2016] AC 660, the court found that R1 was vicariously liable for R2's negligence for the following reasons: (a) R1 was more likely to have the means than R2 to compensate the appellant, and R1 was expected to be insured; (b) R2 had committed the tort in the course of her activity conducted on behalf of her employer. The appellant's mother did not choose R2 to treat her and to deliver her baby. She chose PMC, which was R1's hospital. R2 treated NAZ and delivered the appellant on behalf of PMC and R1; (c) R2's activity was part of PMC's and R1's business activity; (d) by employing R2 to carry out the activity of obstetrics and gynaecology despite her lack of specialist qualifications in the field, PMC and R1 had created the risk of the tort of negligence committed by R2; (e) R2 was under the control of PMC and R1 pursuant to her contract of employment. R1 had directed R2 to carry out the activity of obstetrics and gynaecology at PMC; and (f) R2 had negligently done what she was employed to do. She failed to provide advice and information regarding the delivery options available to NAZ, including the risks and benefits of each option, and failed to provide NAZ with any advice or information prior to undertaking the vacuum extraction. Her negligent use of excessive traction whilst carrying out the vacuum extraction in the presence of shoulder dystocia caused the brachial plexus injury to the appellant (see paras 76–79).

(6) R1's claim against R2 for contribution and indemnity had to be dismissed because: (a) R1 as the employer which stood to generate profits from its employees' activities, ought to bear the potential liability arising from that activity; (b) the employer could spread the risk through pricing and insurance; it was better organised and able to bear the risk than the employee; and (c) deterrence of future harm by encouraging the employer, who had the relevant control over its employee, to take steps to reduce the risk of similar harm in the future (see paras 88–89).

(7) The amounts awarded by the High Court in respect of special damages, pre-trial damages and general damages were fair and reasonable and did not merit appellate intervention. This included the award of RM75,000 for general damages for pain and suffering and loss of amenities for the brachial plexus injury and general damages of RM3,850 awarded for the repair surgery that the appellant underwent when she was two years old (see paras 98–99).

(8) The appellant was awarded the following future general damages: (a) cost of humeral external rotation osteotomy and lengthening with elongation nail surgery — RM15,000; (b) physiotherapy — RM345,600; (c) occupational therapy — RM34,560; (d) equipment replacement costs — RM1,200 each to replace Theraband, weights, hand putty and exercise ball; (e) replacement costs for arm sling and splint/orthosis — RM7,500 and RM7,200, respectively: (f) custom-fit athletic arm sling replacement cost — RM2,500; and (g) costs for medical consultations — RM8,400 for orthopaedic surgeon consultations, RM8,400 for consultations with a rehabilitation physician, RM1,650 for cost of visits to a paediatrician until the appellant was 18 years old and RM48,000 for costs of medical consultations with a clinical psychologist (see paras 101–103).

[Bahasa Malaysia summary

Perayu bayi telah didapati mengalami kecederaan plexus brachial di sekitar kawasan bahu kiri selepas kelahirannya pada September 2013 di Pusat Perubatan Putra ('PMC') yang dimiliki dan dikendalikan oleh responden pertama ('R1'). Perayu telah disambut kelahirannya oleh responden kedua ('R2') yang ketika itu merupakan pegawai perubatan, tetapi bukan pakar, yang bekerja di PMC di jabatan obstetrik dan ginekologinya. Kes perayu adalah kecederaan plexus brachial disebabkan oleh R2 yang menggunakan daya tarikan yang berlebihan semasa dia melakukan kelahiran vakum dengan adanya distosia bahu. Kedua-dua responden menafikan bahawa distosia bahu telah terjadi semasa kelahiran perayu. Mereka memplidkan bahawa pengekstrakan vakum telah dilakukan untuk membantu kelahiran perayu kerana usaha ibu yang lemah. R2 juga memplidkan bahawa pengekstrakan vakum digunakan kerana ibu perayu, NAZ, kelihatan keletihan pada masa itu. Selepas perbicaraan, Mahkamah Tinggi menolak saman kecuaian perubatan perayu terhadap responden selepas mendapati bahawa: (a) ibu perayu, NAZ, berada dalam keadaan keletihan maternal yang memerlukan penggunaan pengekstrakan vakum semasa kelahiran; (b) distosia bahu tidak terjadi semasa kelahiran perayu; and (c) kecederaan plexus brachial perayu tidak disebabkan oleh tarikan berlebihan yang dikenakan oleh R2 semasa kelahiran vakum dengan adanya distosia bahu. Rayuan semasa adalah terhadap keputusan Mahkamah Tinggi mengenai liabiliti dan kuantum.

Diputuskan, sebulat suara mengenepikan keputusan Mahkamah Tinggi mengenai liabiliti, mendapati responden yang bertanggungjawab atas kecederaan plexus brachial yang dialami oleh perayu, memutuskan R1 bertanggungjawab secara vikarius bagi kecuaian R2, menolak tuntutan R1 terhadap R2 bagi kebertanggungjawaban dan indemniti, mengesahkan award Mahkamah Tinggi untuk ganti rugi khas, ganti rugi pra-perbicaraan dan ganti rugi am dan sebahagiannya membenarkan rayuan terhadap award Mahkamah Tinggi untuk ganti rugi am masa hadapan:

(1) Hakim Mahkamah Tinggi secara jelas tersilap, atas sebab-sebab berikut, dalam mendapati bahawa terdapat keletihan maternal yang mewajarkan R2 untuk menjalankan kelahiran vakum perayu: (a) hakim perbicaraan gagal mengambilkira bahawa kedua-dua responden telah memplidkan bahawa pengekstrakan vakum telah dilakukan untuk membantu kelahiran perayu kerana 'usaha maternal yang lemah' NAZ dan bukan kerana 'keletihan maternal' (lihat perenggan 13); (b) tiada mana-mana bahawa R2 memplidkan atau menyatakan dalam pernyataan saksinya bahawa dia telah menggunakan pengekstrakan vakum kerana 'keletihan maternal'. Dapatan hakim perbicaraan bahawa terdapat 'keletihan maternal' untuk menjamin kelahiran vakum hanya berdasarkan keterangan lisan R2 di mana dia menyatakan, 'pertimbangan klinikal saya, saya nampak dia keletihan'; (c) hakim perbicaraan gagal mengambilkira kenyataan konsisten NAZ semasa keterangannya bahawa pada masa kelahiran dia tidak letih dan R2 tidak pernah bertanya sama ada dia letih atau kepenatan sebelum R2 memutuskan untuk menjalankan pengekstrakan vakum perayu; (d) tiada mana-mana bahawa R2 mengatakan bahawa dia telah memeriksa atau bertanya kepada NAZ sama ada dia letih atau kepenatan sebelum membuat keputusan untuk melakukan pengekstrakan vakum. Keterangan menunjukkan bahawa frasa 'keletihan maternal' pertama kali disebut dalam laporan perubatan tidak bertarikh yang disediakan oleh R2 lebih lima tahun selepas kelahiran perayu untuk siasatan dalaman oleh PMC yang diadakan pada 19 Januari 2018. Dakwaan bahawa terdapat 'keletihan maternal' tidak pernah direkodkan dalam rekod perubatan kontemporari yang dibuat semasa, atau tidak lama selepas, kelahiran; (e) hakim perbicaraan tidak mengambilkira pendapat pakar perayu (PW1) bahawa NAZ tidak akan mengalami keletihan maternal selepas 15 hingga 20 minit penolakan; and (f) hakim perbicaraan tidak cukup mengambilkira pendapat saksi pakar R2 (DW4) bahawa kelahiran vakum dilakukan kerana keletihan maternal timbul daripada kesilapan pertimbangan DW4 (kesilapan yang dia akui semasa perbicaraan) bahawa laporan perubatan tidak bertarikh R2 telah disediakan lebih daripada lima tahun selepas kelahiran perayu adalah sebahagian daripada rekod perubatan semasa kelahiran (lihat perenggan 12–16, 19–18 & 23–25).

(2) Hakim perbicaraan adalah jelas salah, atas sebab-sebab berikut, dalam mendapati bahawa tiada distosia bahu semasa kelahiran perayu serta dalam mendapati kecederaan plexus brachial tidak disebabkan atau disumbangkan secara material oleh daya tarikan berlebihan yang digunakan oleh R2 semasa kelahiran vakum dengan adanya distosia bahu: (a) pakar pediatrik di PMC, Dr Marina, yang melihat perayu tiga hari selepas kelahirannya merekodkan bahawa terdapat kejadian distosia bahu pada bahu kiri perayu. Rekod ini adalah sebahagian daripada rekod perubatan kontemporari yang dibuat dan disimpan oleh PMC dan telah dikemukakan semasa perbicaraan sebagai sebahagian daripada dokumen Bahagian B responden, di mana kesahihannya tidak dipertikaikan tetapi kandungannya dipertikaikan; (b) perayu bergantung kepada nota Dr Marina sebagai keterangan bagi distosia bahu kiri tiga hari selepas kelahiran perayu. Memandangkan responden berpendapat bahawa tiada distosia bahu kiri seperti yang direkodkan oleh Dr Marina, beban adalah di bawah s 102 Akta Keterangan 1950 ('EA') untuk memanggil Dr Marina untuk membuktikan bahawa dakwaannya itu salah. Sekiranya tiada keterangan diberikan oleh mana-mana pihak, perayu akan berjaya kerana rekod perubatan Dr Marina tidak dipertikaikan dan dakwaan responden bahawa penegasan Dr Marina adalah salah tidak akan dapat dibuktikan. Oleh itu, beban pembuktian adalah kepada responden untuk memanggil Dr Marina; (c) hakim perbicaraan tidak memberi sebarang pertimbangan kepada pendaftaran kontemporari Dr Marina tentang distosia bahu dalam rekod perubatan kerana dia tidak hadir semasa kelahiran perayu dan kerana perayu tidak memanggilnya sebagai saksi. Berdasarkan s 102 EA, hakim perbicaraan jelas salah dalam memutuskan bahawa perayu adalah tanggungjawab untuk memanggil Dr Marina untuk membuktikan bahawa kemasukannya dalam rekod perubatan PMC adalah tepat apabila responden yang mempertikaikan pendaftarannya bagi distosia bahu dalam rekod perubatan; (d) hakim perbicaraan jelas salah apabila memutuskan bahawa kecederaan plexus brachial perayu mungkin disebabkan oleh 'propulsi maternal' apabila sebab sedemikian tidak diplidkan oleh responden atau dimasukkan dalam isu yang akan dibicarakan atau dinyatakan dalam mana-mana rekod perubatan atau laporan perubatan; (e) dalam mendapati tiada distosia bahu semasa kelahiran, hakim perbicaraan gagal mengambil kira pendapat pakar, PW1 dan DW4, bahawa kecederaan plexus brachial yang tidak dikaitkan dengan distosia bahu adalah jarang berlaku dan dua pertiga daripada kecederaan tersebut dikaitkan dengan distosia bahu. Hakim juga gagal untuk mengambilkira keterangan pakar dan kesusasteraan perubatan bahawa di mana terdapat distosia bahu, penggunaan daya tarikan yang berlebihan melalui kelahiran vakum atau pengekstrakan forsep mungkin menyebabkan kecederaan plexus brachial; dan (f) hakim perbicaraan gagal memberikan alasan mengapa dia lebih

mengutamakan pendapat pakar DW4 daripada pendapat pakar PW1 dan DW3. Undang-undang telah ditetapkan bahawa mahkamah mesti menganalisis keterangan pakar untuk menentukan sama ada ia munasabah atau bertanggungjawab dan menahan analisis logik. Mahkamah tidak boleh menyatakan bahawa ia mengutamakan pendapat seorang pakar berbanding pendapat pakar lain tanpa memberikan sebarang alasan untuk berbuat demikian (lihat perenggan 33, 36–40, 48, 53, 55 & 58–61).

(3) Berdasarkan keterangan di hadapan mahkamah perbicaraan dan pendapat pakar perubatan, mahkamah mendapati kecederaan plexus brachial yang dialami oleh perayu adalah disebabkan atau disumbangkan secara material oleh daya tarikan berlebihan yang digunakan oleh R2 semasa kelahiran vakum dengan adanya distosia bahu (lihat perenggan 63).

(4) R2 cuai dalam rawatannya terhadap perayu dan NAZ semasa bersalin dan dalam kelahiran perayu. R2 mempunyai tugas berhati-hati terhadap kedua-dua mereka dan dia melanggar tugas berhati-hati itu dengan melakukan kelahiran vakum apabila tiada keletihan maternal untuk mewajarkan penggunaannya, dan dengan menggunakan daya tarikan yang berlebihan dengan adanya distosia bahu. Atas sebab pelanggaran tugas berhati-hatinya, R2 menyebabkan perayu mengalami kecederaan plexus brachial (lihat perenggan 64).

(5) Menggunakan kriteria untuk mengenakan liabiliti vikarius yang dibuat oleh Lord Phillips dalam *Various Claimants v Catholic Child Welfare Society and others* [2013] 2 AC 1, seperti yang dijelaskan dan dihuraikan dengan lebih lanjut dalam *Cox v Ministry of Justice* [2016] AC 660, mahkamah mendapati bahawa R1 bertanggungjawab secara vikarius atas kecuaian R2 atas sebab-sebab berikut: (a) R1 lebih berkemungkinan mempunyai cara berbanding R2 untuk membayar pampasan kepada perayu, dan R1 dijangka akan diinsuranskan; (b) R2 telah melakukan tort semasa aktivitinya dijalankan bagi pihak majikannya. Ibu perayu tidak memilih R2 untuk merawatnya dan melahirkan bayinya. Dia memilih PMC, iaitu hospital R1. R2 merawat NAZ dan menyambut perayu bagi pihak PMC dan R1; (c) aktiviti R2 adalah sebahagian daripada aktiviti perniagaan PMC dan R1; (d) dengan menggunakan R2 untuk menjalankan aktiviti obstetrik dan ginekologi walaupun beliau tidak mempunyai kelayakan pakar dalam bidang tersebut, PMC dan R1 telah mewujudkan risiko tort kecuaian yang dilakukan oleh R2; (e) R2 berada di bawah kawalan PMC dan R1 menurut kontrak pekerjaannya. R1 telah mengarahkan R2 untuk menjalankan aktiviti obstetrik dan ginekologi di PMC; dan (f) R2 telah cuai melakukan apa yang ditugaskan olehnya. Dia gagal memberikan nasihat dan maklumat mengenai pilihan kelahiranyang tersedia untuk NAZ, termasuk risiko

dan faedah setiap pilihan, dan gagal memberikan NAZ dengan sebarang nasihat atau maklumat sebelum menjalankan pengekstrakan vakum. Kecuaiannya menggunakan tarikan berlebihan semasa menjalankan pengekstrakan vakum dengan kehadiran distosia bahu menyebabkan kecederaan plexus brachial kepada perayu (lihat perenggan 76–79).

(6) Tuntutan R1 terhadap R2 untuk kebertanggungjawaban dan indemniti terpaksa ditolak kerana; (a) R1 sebagai majikan yang berdiri untuk menjana keuntungan daripada aktiviti pekerjanya, sepatutnya menanggung potensi liabiliti yang timbul daripada aktiviti itu; (b) majikan boleh menyebarkan risiko melalui penetapan harga dan insurans; ia lebih teratur dan mampu menanggung risiko daripada pekerja; and (c) mencegah kemudaratan masa depan dengan menggalakkan majikan, yang mempunyai kawalan yang berkaitan ke atas pekerjanya, untuk mengambil langkah untuk mengurangkan risiko kemudaratan yang serupa pada masa hadapan (lihat perenggan 88–89).

(7) Amaun yang diawardkan oleh Mahkamah Tinggi berkenaan dengan ganti rugi khas, ganti rugi pra-perbicaraan dan ganti rugi am adalah adil dan munasabah dan tidak layak campur tangan rayuan. Ini termasuk award RM75,000 untuk ganti rugi am untuk kesakitan dan penderitaan dan kehilangan kemudahan untuk kecederaan plexus brachial dan ganti rugi am sebanyak RM3,850 yang diberikan untuk pembedahan pembaikan yang telah dilalui oleh perayu semasa dia berumur dua tahun (lihat perenggan 98–99).

(8) Perayu telah diberikan ganti rugi am masa hadapan yang berikut: (a) kos osteotomi putaran luar humeral dan pemanjangan dengan elongasi pembedahan kuku — RM15,000; (b) fisioterapi — RM345,600; (c) terapi cara kerja — RM34,560; (d) kos penggantian peralatan — RM1,200 setiap satu untuk menggantikan Theraband, pemberat, dempul tangan dan bola senaman; (e) kos penggantian untuk anduh lengan dan splint/orthosis — masing-masing RM7,500 dan RM7,200; (f) kos penggantian anduh lengan atletik yang sesuai — RM2,500; and (g) kos untuk perundingan perubatan — RM8,400 untuk perundingan pakar bedah ortopedik, RM8,400 untuk perundingan dengan doktor pemulihan, RM1,650 untuk kos lawatan ke pakar kanak-kanak sehingga perayu berumur 18 tahun dan RM48,000 untuk kos perundingan perubatan dengan ahli psikologi klinikal (lihat perenggan 101 & 103).]

Cases referred to

Dr Kok Choong Seng & Anor v Soo Cheng Lin and another appeal [2018] 1 MLJ 685; [2017] 10 CLJ 529; [2017] 6 AMR 609, CA (refd)

Dr Premitha Damodaran v GTK (a child suing through her father and litigation representative, Taranjeet Singh a/l Bhagwan Singh) & Anor and another appeal

[2022] 3 MLJ 484; [2022] 3 CLJ 797; [2021] AMEJ 215, CA (refd)
Dream Property Sdn Bhd v Atlas Housing Sdn Bhd [2015] 2 MLJ 441; [2015] 2 CLJ 453; [2015] 2 AMR 60, FC (refd)
Elizabeth Chin Yew Kim & Anor v Dato' Ong Gim Huat (sued as public officer of Hospital Lam Wah Ee) and other appeals [2017] 1 MLJ 328; [2017] 2 CLJ 274, CA (refd)
Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1; [2004] 4 CLJ 309; [2004] 6 AMR 781, FC (refd)
Giga Engineering & Construction Sdn Bhd v Yip Chee Seng & Sons Sdn Bhd & Anor [2015] 6 MLJ 449; [2015] 9 CLJ 537; [2015] 6 AMR 765, FC (refd)
Iftikar Ahmed Khan (as the executor of the estate for Sardar Mohd Roshan Khan, deceased) v Perwira Affin Bank Bhd (previously known as Perwira Habib Bank Malaysia Bhd) [2018] 2 MLJ 292; [2018] 1 CLJ 415, FC (refd)
Majlis Perbandaran Pulau Pinang v Lim Soo Seng [1991] 1 MLJ 162; [1991] 1 CLJ 253, SC (distd)
Medi-Circle Sdn Bhd v Nur Zulaikha bt Dzulzaili (suing through her father and litigation representative, Dzulzaili bin Muhammad Nor) and other appeals [2022] MLJU 1575; [2022] CLJU 1546; [2022] AMEJ 0961, CA (refd)
Mohd Sabri bin Mohamad Zin v Dr M Nachiappan & Anor [2017] MLJU 2443, HC (refd)
Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors [2020] 12 MLJ 67; [2020] 10 CLJ 1, FC (refd)
Samuel Naik Siang Ting v Public Bank Bhd [2015] 6 MLJ 1; [2015] 8 CLJ 944; [2018] 3 AMR 259, FC (refd)
Siow Ching Yee (suing through his wife and litigation representative, Chau Wai Kin) v Columbia Asia Sdn Bhd [2024] 3 MLJ 66; [2024] 3 AMR 485; [2024] 4 CLJ 173, FC (refd)
Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd and another and another appeal [2011] SGCA 22; [2011] 3 SLR 540, CA (refd)
UEM Group Bhd (previously known as United Engineers (M) Bhd v Genisys Integrated Engineers Pte Ltd & Anor [2018] supp MLJ 363; [2010] MLJU 2179; [2010] 9 CLJ 785; [2011] 1 AMCR 338, FC (refd)
Various Claimants v Catholic Child Welfare Society and others [2013] 2 AC 1, SC (folld)
Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd and others [2006] QB 510, CA (refd)
Woodland v Essex County Council [2014] 1 All ER 482, SC (refd)
Zulhasnimar bt Hasan Basri & Anor v Dr Kuppu Velumani P & Ors [2017] 5 MLJ 438; [2017] 8 CLJ 605; [2017] 5 AMR 413; [2017] AMEJ 0927, FC (refd)

Legislation referred to

Civil Law Act 1956 s 10(1)(c)
Evidence Act 1950 ss 102, 114 (g)

Rules of Court 2012 O 34 r 2(e)

Appeal from: *Airis Nurhana bt Alfian (seorang kanak-kanak yang menyaman melalui bapa dan wakil litigasinya Alfian bin Zainudin) v Darul Aiman Sdn Bhd & Anor* [2023] MLJU 214 (High Court, Shah Alam)

MS Dhillon (with Desmond Mun and Alicia Chin) (PS Ranjan & Co) for the appellant.
Wong Ik Ling (Azim, Tunku Farik & Wong) for the first respondent.
Goh Lee Ding (Chan Ban Eng & Co) for the second respondent.

Faizah Jamaludin J:

INTRODUCTION

[1] This is an appeal by Airis Nurhana bt Alfian ('the appellant') (through her new litigation representative and mother, Nursuharly bt Abu Zami, following the demise of her previous litigation representative and father, Alfian bin Zainuddin) against the decision of the High Court dated 19 October 2022 as regards both to liability and quantum.

[2] The appellant suffered a brachial plexus injury following her birth on 3 September 2013 at Putra Medical Centre ('PMC'). The first respondent ('R1'), at the material time, is the owner and operator of PMC.

[3] The appellant was delivered by the second respondent, Dr Wan Ratna Iza bt Wan Abdul Rahim ('R2'): R2 was a medical officer who practices obstetrics and gynaecology at PMC. However, she does not have any specialist qualifications, and she is not registered on the Specialist Register maintained by the Malaysian Medical Council. At the material time, R2 was employed by PMC.

[4] The appellant had brought an action at the Shah Alam High Court for medical negligence against R1 and R2. Her action was dismissed by the learned High Court judge with costs in the sum of RM15,000 and RM25,000 to be paid by the appellant to R1 and R2 respectively.

[5] The parties are all in agreement that the appellant suffered a brachial plexus injury around the region of her left shoulder following her birth at PMC. They, however, disagree as to the cause of the appellant's brachial plexus injury.

[6] The appellant pleaded that the brachial plexus injury was caused by shoulder dystocia and excessive traction during her delivery. R2 had delivered

A the appellant by way of vacuum extraction.

[7] Both R1 and R2 denied that shoulder dystocia had occurred during the appellant's birth. R1 and R2 pleaded that vacuum extraction was undertaken to assist with the appellant's birth due to poor maternal effort. R2 also pleaded that vacuum extraction was used because the appellant's mother seemed exhausted.

[8] Both R1 and R2 did not plead any alternative causes of the brachial plexus injury to the appellant.

PRINCIPLES OF APPELLATE INTERVENTION

[9] The law is settled that an appellate court ought not to intervene with the trial court's conclusion on primary facts unless it is satisfied the trial judge was plainly wrong. Based on this 'plainly wrong test', an appellate court is entitled to examine the process of evaluation of evidence by the trial court and may set aside any decision of the trial court with no or insufficient judicial appreciation of the evidence: see the Federal Court decisions in *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309; [2004] 6 AMR 781; *UEM Group Bhd (previously known as United Engineers (M) Bhd v Genisys Integrated Engineers Pte Ltd & Anor* [2018] supp MLJ 363; [2010] MLJU 2179; [2010] 9 CLJ 785; [2011] 1 AMCR 338; *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2015] 2 MLJ 441; [2015] 2 CLJ 453; [2015] 2 AMR 60; *Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors* [2020] 12 MLJ 67; [2020] 10 CLJ 1.

Was the trial judge plainly wrong in her findings of facts?

[10] The learned High Court judge had set in her grounds of judgment the following issues for determination by the trial court:

(a) whether there was maternal exhaustion to warrant the vacuum delivery;

(b) whether there was shoulder dystocia; and

(c) whether the brachial plexus injury was caused or materially contributed by excessive traction applied by R2 during vacuum delivery in the presence of shoulder dystocia.

[11] On these issues, the learned trial judge made the following findings of facts: (a) the appellant's mother, Puan Nursuharly, was in a state of maternal exhaustion to warrant the appellant's delivery by way of vacuum extraction; (b) shoulder dystocia did not occur during the appellant's delivery; and (c) the appellant's brachial plexus injury was not caused by excessive traction applied

by R2 during the vacuum delivery in the presence of shoulder dystocia.

Was there maternal exhaustion to warrant the vacuum delivery?

[12] The learned judge made her finding that there was maternal exhaustion to warrant vacuum delivery based on R2's oral evidence alone. She found that the appellant's mother's maternal exhaustion warranted the appellant's vacuum delivery based on R2's oral evidence, where she stated, 'my clinical judgment, I saw she is exhausted'.

[13] In making the finding, the learned judged failed to take into account that both R1 and R2 had pleaded that vacuum extraction was undertaken to assist with the appellant's birth because of her mother's 'poor maternal effort' and not because of 'maternal exhaustion'.

[14] Her Ladyship also failed to take into account that R2 had pleaded in para 18.1 of her amended statement of defence 'Kelahiran Plaintif dibantu melalui vakum melihatkan kepada keletihan dan 'poor maternal effort' Puan Nursuharly'. Similarly, in her witness statement, R2 stated in her answer to Q and A 20 that Puan Nursuharly showed 'poor maternal effort'. Nowhere did R2 plead or state in her witness statement that she had used vacuum extraction because of 'maternal exhaustion'.

[15] Furthermore, in making the finding that there was maternal exhaustion, the learned judge failed to take into account Puan Nursuharly's (PW2) own oral testimony, where when asked by the plaintiff's counsel and under cross-examination by R1's and R2's counsel, Puan Nursuharly consistently answered that at the time of delivery, she was not tired.

[16] The learned High Court judge also failed to take into account that Puan Nursuharly consistently testified that R2 never asked her whether she was exhausted or tired before R2 made the decision to undertake vacuum extraction of the appellant during the delivery. Puan Nursuharly's testimony is in line with R2's oral testimony that 'my clinical judgment, I saw she is exhausted' — nowhere did R2 say that she had checked or asked Puan Nursuharly whether she was tired or exhausted before making the decision to undertake vacuum extraction.

[17] The evidence shows that the phrase 'maternal exhaustion' was first mentioned in an undated medical report prepared by R2 more than five years after the appellant's birth for an internal inquiry by PMC held on 19 January 2018. This fact was conceded by R1's counsel.

[18] Further, the learned High Court judge also did not take into account the opinion of the appellant's expert, Dr Milton Lum (PW1), that Puan Nursuharly would not be maternally exhausted 15 to 20 minutes after she was asked to 'bear down' by R2. Dr Milton Lum in para 109 of his expert report stated:

> 109. There was no indication for vacuum extraction because:
>
> (a) There were no foetal and maternal reasons;
>
> (b) There was no evidence of inadequate progress. NAZ [the Appellant's mother, Puan Nursuharly binti Aby Zami] was pushing for 15-20 minutes when the decision for vacuum extraction was made.
>
> (c) Dr WRI [R2] claimed that the reason was maternal exhaustion. It would be a huge jump in logic to accept such a claim that NAZ was exhausted after 15–20 minutes of pushing.

[19] R2's claim of maternal exhaustion requiring vacuum delivery in her undated report was not recorded in the contemporaneous medical records made during delivery. Neither was it made retrospectively in any medical records soon after delivery. As stated above, the claim was made only in the medical report R2 prepared more than five years after the delivery for purposes of the internal inquiry conducted by PMC.

[20] Dr Zaleha Abdullah Mahdy (DW4), who is R2's expert, on liability, stated in section G(a) of her expert report that the established indicators for vacuum-assisted delivery include: (a) prolonged second stage of labour; (b) non-reassuring foetal heart rate pattern; (c) elective shortening of the second stage labour; and (d) maternal exhaustion.

[21] As the evidence shows, nothing in the medical records of the appellant's delivery showed that any of these four established indicators for vacuum-assisted delivery were present during Puan Nursuharly's labour before R2 decided to undertake vacuum-assisted delivery.

[22] Nonetheless, Dr Zaleha based on the medical report prepared by R2 more than five years after the appellant's birth concluded that the vacuum-assisted delivery undertaken by R2 was due to maternal exhaustion.

[23] Under cross-examination, Dr Zaleha said that she thought R2's medical report was part of the contemporaneous medical records relating to the appellant's delivery. Dr Zaleha admitted that she was unaware that R2 had prepared the report more than five years after the appellant's birth.

[24] The learned High Court judge in her judgment did not sufficiently appreciate the evidence that Dr Zaleha's opinion — that the vacuum delivery was due to maternal exhaustion — arose from Dr Zaleha's mistaken belief that R2's undated medical report was part of the contemporaneous medical records documenting the appellant's birth.

[25] Accordingly, for these reasons, we find that the learned High Court judge did not properly evaluate the evidence before her: she did not take into account: (a) Puan Nursuharly's testimony that she was not exhausted; and (b) Dr Milton Lum's expert evidence that it is unlikely that Puan Nursuharly would have been exhausted after 15–20 minutes of pushing. We further find that the learned High Court judge did not judicially appreciate Dr Zaleha's expert opinion that the vacuum delivery was undertaken due to Puan Nursuharly's maternal exhaustion was based on her mistaken belief that R2's medical report (prepared five years after the event) which mentioned 'maternal exhaustion' was part of the contemporaneous medical records of the delivery; a mistake which Dr Zaleha admitted during the trial.

[26] For these reasons, we find that the learned High Court judge was plainly wrong in finding that there was maternal exhaustion warranting R2 to undertake vacuum delivery of the appellant.

Did shoulder dystocia occur during the appellant's delivery?

[27] Dr Milton Lum testified that the vacuum delivery by itself would not cause a brachial plexus injury unless there was some shoulder dystocia present.

[28] It is the appellant's case, that the brachial plexus injury sustained by the appellant was caused by excessive traction from the vacuum delivery in the presence of shoulder dystocia.

[29] What is shoulder dystocia? Dr Lum in his expert report explained shoulder dystocia as follows:

> 75. SD [shoulder dystocia] has been defined as vaginal cephalic delivery that requires additional obstetric manoeuvres to deliver the foetus after the head was delivered and gentle traction has failed i.e. it occurs when the foetal head has been born, but one of the shoulders gets stuck. SD is an obstetric emergency that can be unanticipated and unpredictable. (*Royal College of Obstetricians & Gynaecologists. Shoulder dystocia. March 2012 page 2*).
>
> 76. The factors associated with SD are pre-labour and during labour. The former includes previous SD, macrosomia > 4.5 kg. diabetes mellitus, maternal body mass index > 30kg/m2 and induction of labour. The latter includes prolonged first stage of labour, secondary arrest, prolonged second stage of labour, oxytocin use and assisted vaginal delivery.

[30] Dr Zaleha in her expert report (which excerpt is reproduced below) stated that approximately two-thirds of brachial plexus injuries are associated with shoulder dystocia. Dr Zaleha, in section G of her expert report, stated:

> b. Where BPI [brachial plexus injury] is associated with shoulder dystocia (approximately two thirds of the case), the position of the affected limb is most likely anterior, while BPI without shoulder dystocia (approximately one third of cases) tends to affect the posterior arm. The anterior shoulder gets caught behind the pubic symphysis while the posterior shoulder gets 'hung up' on the sacral promontory. (Sandmire HF, DeMott RK, Erb's Palsy causation: a historical perspective. Birth 2002; 29; 52–54).

[31] Dr Zaleha's opinion is in line with Dr Lum's opinion that brachial plexus injuries not associated with shoulder dystocia are uncommon. He said in para 94 of his expert report:

> 94. BPI cases not associated with SD are uncommon and the majority of these injuries are temporary. When the BP is permanent, it is probable that there was SD and/or excess traction.

[32] On the question of whether R2 had caused or materially contributed to the injuries suffered by the appellant, Dr Zaleha stated that it was the negative based on, inter alia, the following reasons:

> i. Erb's Palsy is not necessarily attributable to shoulder dystocia as in the case of ANA [the appellant], where there were no clear risk factors and the birth weight was within normal limits.
>
> ii. There was no indication to perform elective or emergency caesarean section to deliver ANA because there was no suspicion of macrosoma at all, and NAZ's labour progressed well up to the second stage. The vacuum-assisted delivery was also successfully and uneventfully performed.

[33] The occurrence of shoulder dystocia on the appellant's left shoulder was recorded by Dr Marina, a paediatrician at PMC, who saw the appellant on 7 September 2013 — three days after her birth.

[34] However, the learned judge decided not to give any weight to Dr Marina's contemporaneous entry of shoulder dystocia in the medical records because Dr Marina was not present at the appellant's birth and because the appellant did not call her as a witness.

[35] Additionally, the learned judge stated in para 45 of her judgment that since it was the appellant's case that there was shoulder dystocia, the appellant should have called Dr Marina to support her case.

[36] In holding that the appellant should have called Dr Marina as a witness to prove the contents of her medical record that there was shoulder dystocia, the learned High Court judge failed to consider that the record made by Dr Marina was part of the contemporaneous medical records made and kept by PMC.

[37] Dr Marina's medical record was tendered during the trial as part of the respondents' documents. They were tendered by the respondents and were marked as Part B documents during the trial. Order 34 r 2(e) of the Rules of Court 2012 states that Part B documents are 'documents where the authenticity is not disputed but the contents are disputed'.

[38] The appellant does not dispute the contents of the medical record — in fact, she is relying upon Dr Marina's note of 'L Shoulder dystocia' in the medical record as evidence that there was shoulder dystocia present on the appellant's left shoulder three days after her birth.

[39] As the respondents are disputing the contents of their own document, under s 102 of the Evidence Act 1950 the onus is on them to call Dr Marina to prove that the note of 'L Shoulder Dystocia' she had made in her medical record was wrong. Section 102 of the Evidence Act 1950 reads:

> The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
>
> ILLUSTRATIONS
>
> (a) A sues B for land of which B is in possession, and which, as A asserts, was left to A by the will of C, B's father.
>
> If no evidence were given on either side, B would be entitled to his possession. Therefore the burden of proof is on A.
>
> (b) A sues B for money due on a bond.
>
> The execution of the bond is admitted, but B says that it was obtained by fraud, which A denies.
>
> If no evidence were given on either side, A would succeed as the bond is not disputed and the fraud is not proved.
>
> Therefore the burden of proof is on B.

[40] The situation in this present appeal is akin to that in Illustration (b) in s 102 of the Evidence Act 1950. Here, the appellant sued the respondents for medical negligence. The respondents claim that Dr Marina's medical record that there was shoulder dystocia was wrong, which the appellant denies. If no evidence was given by the appellant or the respondents, the appellant would succeed as Dr Marina's medical record is not disputed and the respondent's claim that Dr Marina had wrongly entered shoulder dystocia in the records is

not proven. Therefore, the burden of proof is on the respondents.

[41] Dr Marina at the time of making the medical record and at the time of the trial was an employee of PMC. The respondents, if they wanted to, could have called her as a witness.

[42] R1 and R2's case is that there was no shoulder dystocia because there was nothing in the contemporaneous medical records of the delivery to state that there was 'shoulder dystocia'. However, as R2's own expert (Dr Zaleha) agreed, R2 had kept scant contemporaneous medical record of the delivery. There was no mention of 'maternal exhaustion' or of 'maternal propulsions' in the contemporaneous medical records. Nonetheless, both R1's and R2's case is that the use of a vacuum to assist with the delivery was because of 'maternal exhaustion' and that the brachial plexus injury to the appellant was caused by the unpleaded cause of 'maternal propulsions'. In fact, 'maternal propulsions' was first mentioned in Dr Zaleha's expert report as a possible cause of the brachial plexus injury.

[43] It is trite that parties are bound by their pleadings and are not allowed to adduce facts and evidence, which were not pleaded. Courts too are not allowed to decide on issues that were not raised by the parties in their pleadings: see the Federal Court decisions in *Giga Engineering & Construction Sdn Bhd v Yip Chee Seng & Sons Sdn Bhd & Anor* [2015] 6 MLJ 449; [2015] 9 CLJ 537; [2015] 6 AMR 765; *Samuel Naik Siang Ting v Public Bank Bhd* [2015] 6 MLJ 1; [2015] 8 CLJ 944; [2018] 3 AMR 259; and *Iftikar Ahmed Khan (as the executor of the estate for Sardar Mohd Roshan Khan, deceased) v Perwira Affin Bank Bhd (previously known as Perwira Habib Bank Malaysia Bhd)* [2018] 2 MLJ 292; [2018] 1 CLJ 415.

[44] In *Mohd Sabri bin Mohamad Zin v Dr M Nachiappan & Anor* [2017] MLJU 2443, Vazeer Alam Mydin Meera J (now FCJ) held that the defendant was under a duty to plead any alternative causation if the defendant was disputing the causation pleaded by the plaintiff. His Lordship said:

> ... if the first defendant thinks that there is some other cause for the plaintiff's injuries, then it is incumbent upon the first defendant to plead his case on causation. He has not done so. See Patrick Curran on Personal Injury Pleadings, para F7-0G4.

[45] In this instant case, even though the respondents did not plead that the brachial plexus injury was caused by 'maternal propulsions', and 'maternal propulsions' was not mentioned in any of the medical records as a possible cause of the brachial plexus injury, the learned trial judge in her grounds of judgment stated that she preferred Dr Zaleha's expert opinion that the brachial plexus injury may have been caused by 'maternal propulsions'.

[46] The learned High Court judge in para 59 of her judgment stated, 'It is not for the defendant to plead any other cause merely because they denied the incidence of shoulder dystocia'. With respect to the learned High Court judge, because the respondents did not plead any alternative causes for the brachial plexus injury or raise it as an issue to be tried, the law does not allow the court to decide and go on to find that the cause of the appellant's brachial plexus injury may be maternal propulsions.

[47] We find that in light of s 102 of the Evidence Act 1950, the learned judge was plainly wrong to have decided that the onus was on the appellant to call Dr Marina to prove that her entry in PMC's medical records was accurate when it was the respondents who disputed her entry of 'L shoulder dystocia' in the medical records.

[48] We further find that the learned High Court judge was plainly wrong to have decided that a possible cause of the brachial plexus injury was 'maternal propulsions' when such a cause was not pleaded by either R1 or R2, or included in the issues to be tried, or stated in any of the medical records or medical reports.

[49] As regards the opinions of the experts on the possible cause of the brachial plexus injury, R1's expert, Dr Muralitharan a/l Ganesalingam (DW3), agreed with the appellant's expert, Dr Milton Lum, that brachial plexus injuries caused intrauterine such as maternal propulsions are transient — they will not result in an avulsion injury.

[50] Dr Lum stated in his expert report that when the brachial plexus injury is permanent, it is probable that there was an occurrence of shoulder dystocia and/or excessive traction during delivery. Dr Lum's opinion is supported by the medical literature by Bjorn et al, *Obstetric brachial plexus palsy: A birth injury not explained by the known risk factors*, published in Acta Obstetricia et Gynecologica 2008; 87: 1029–1030, which copy of the literature was annexed to his expert opinion: at pp 1420–1425 of *Rekod Rayuan – Jld 2 (Bahagian C)*.

[51] The evidence shows that the appellant's brachial plexus injury is not transient. It is permanent and required her to undergo corrective surgery at the age of two years. Dr Aishah bt Ahmad Fauzi (PW4), the appellant's expert witness on quantum, stated in section 2 of her expert report:

> AN [the Appellant] had a modified quad surgery at the age of 2 years old (2015). This was a series of procedures (muscle release and transfer with nerve decompression) in one surgery which was aimed to improve shoulder abduction, external rotation, elbow and hand function.
>
> At the age of 4 years old she was still having difficulty in externally rotating and supinating left hand ...

[52] The learned High Court judge in para 36 of her judgment expressly stated that she did not accept the appellant's contention that there was evidence of shoulder dystocia. She held that Dr Lum's expert opinion that there was shoulder dystocia 'was a mere postulation on his part'. The learned High Court judge went on to state that the occurrence of shoulder dystocia 'is at best, merely his theory'. However, Her Ladyship accepted Dr Zaleha's (DW4) expert opinion that there was no supporting evidence of shoulder dystocia based on the medical records she had read. Her Ladyship said in para 41 of her judgment:

> 41. Having considered the evidence of the parties' experts, I am inclined to accept the opinion of DW4 in the light of her reasons to support her views.

[53] In finding that there was no shoulder dystocia during the delivery, the learned High Court judge failed to take into account Dr Milton Lum's opinion that brachial plexus injuries not associated with shoulder dystocia is uncommon and Dr Zaleha's opinion that two-thirds of brachial plexus injuries are associated with shoulder dystocia.

[54] Her Ladyship also decided not to give any weight to Dr Marina's contemporaneous medical record that shoulder dystocia was present when she saw the appellant three days after her birth.

[55] The learned High Court judge failed to appreciate the evidence of the experts and the enclosed medical literature that where there is shoulder dystocia, the use of excessive traction through vacuum delivery or forceps extraction may cause brachial plexus injury (or Erb's palsy).

[56] Her Ladyship said that she found Dr Zaleha's expert opinion that shoulder dystocia was not a known complication of vacuum delivery to be more convincing. However, what Dr Zaleha said in her expert report was that 'Erb's Palsy is not necessarily attributable to shoulder dystocia': she did not say that shoulder dystocia is attributable to vacuum delivery.

[57] In fact, none of the experts said that vacuum delivery causes shoulder dystocia. The experts' opinions and the medical literature referred to by the experts all state that shoulder dystocia is not a cause or known complication of vacuum delivery. What the experts said was that vacuum delivery may cause brachial plexus injury where shoulder dystocia is present.

[58] Crucially, the learned judge did not give her reasons as to why she preferred Dr Zaleha's expert opinion over that of Dr Lum's and Dr Muralitharan's expert opinions. It is established law that a court must

analyse the expert evidence to determine if it was reasonable or responsible and withstood logical analysis. A court cannot state that it prefers the opinion of one expert over the other, without giving any reasons. The Federal Court in *Zulhasnimar bt Hasan Basri & Anor v Dr Kuppu Velumani P & Ors* [2017] 5 MLJ 438; [2017] 8 CLJ 605; [2017] 5 AMR 413; [2017] AMEJ 0927 per Raus Sharif PCA (as he then was) held that:

> [44] In *Bolitho*, the qualification to *Bolam* test was that, if the body of medical opinion does not withstand logical analysis, the court may hold that it is not reasonable or responsible and may then depart from it. In effect, *Bolitho* retained the *Bolam* test for all purposes in respect of medical negligence, but made it subject to the condition that for the expert opinion to be acceptable to the courts, it must be capable of withstanding logical analysis.

[59] For these reasons, we find that the learned High Court judge was plainly wrong in making the finding that there was no shoulder dystocia during the appellant's delivery.

Whether the brachial plexus injury was caused or materially contributed by excessive traction applied by R2 during vacuum delivery in the presence of shoulder dystocia

[60] The learned High Court judge made a finding that the appellant's brachial plexus injury was not caused by excessive traction applied by R2 in the presence of shoulder dystocia, based on her finding that there was no shoulder dystocia present.

[61] As we have found that the learned judge was plainly wrong in her finding that there was no shoulder dystocia present, we accordingly find her finding, that the brachial plexus injury to the appellant was not caused or materially contributed by the excessive traction applied by R2 during the vacuum delivery in the presence of shoulder dystocia, also plainly wrong.

Liability

[62] As we have found that the learned High Court judge's findings of fact on all three issues to be tried are plainly wrong, we are of the view that the learned High Court judge's decision on liability warrants appellate intervention.

[63] Based on the evidence before the trial court and the opinions of the medical experts, we find that the brachial plexus injury suffered by the appellant during her delivery by R2 was caused or materially contributed by excessive traction applied by R2 during vacuum delivery in the presence of shoulder dystocia.

[64] We also find that R2 was negligent in her treatment of the appellant and Puan Nursuharly during labour and in her delivery of the appellant. R2 owed a duty of care to both the appellant and Puan Nursuharly, and she breached that duty of care by: (a) undertaking vacuum delivery when there was no maternal exhaustion to warrant the use of a vacuum to assist with the delivery; and (b) by using excessive traction in the presence of shoulder dystocia. By reason of her breach of the duty of care, R2 caused the appellant to suffer the brachial plexus injury.

[65] Counsel for the appellant had submitted that based on the recent majority decision of the Federal Court in *Siow Ching Yee (suing through his wife and litigation representative, Chau Wai Kin) v Columbia Asia Sdn Bhd* [2024] 3 MLJ 66; [2024] 3 AMR 485; [2024] 4 CLJ 173, R1 owed a non-delegable duty of care towards the appellant and her mother, Puan Nursuharly.

[66] The UK Supreme Court in the case of *Woodland v Essex County Council* [2014] 1 All ER 482 ('Woodland') explained that vicarious liability is the one true exception to the principle that liability in tort depends upon proof of personal breach of contract. An employer may be vicariously liable for the tort of its employees.

[67] In the case of *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd and others* [2006] QB 510 ('Viasystems'), Rix LJ in delivering the judgment of the English Court of Appeal said:

> 55 *The concept of vicarious liability does not depend on the employer's fault but on his role. Liability is imposed by a policy of the law upon an employer, even though he is not personally at fault, on the basis, generally speaking, that those who set in motion and profit from the activities of their employees should compensate those who are injured by such activities even when performed negligently*. Liability is extended to the employer on the practical assumption that, inter alia, because he can spread the risk through pricing and insurance, he is better organised and able to bear that risk than the employee, even if the latter himself of course remains responsible; and at the same time the employer is encouraged to control that risk. For these purposes, issues have naturally arisen as to when the relationship of employer and employee, as distinct from that of employer and independent contractor, exists; or as to the doctrine of the course of employment, which seeks to set the scope and limits of the employer's liability. Over the years, the tests which have been adopted to answer these issues have developed in a way which has gradually given precedence to function over form.
>
> ...
>
> 84 It has been established that 'responsibility' includes both causative potency and blameworthiness. However, *in the case of vicarious liability, the employer is liable without personal fault. The fault in question is the employee's. The employer thus stands fully in the shoes of the negligent employee as regards both aspects of responsibility*: see

Dubai Aluminium Co Ltd v Salaam [2003] 2 AC 366, paras 47 and 160. (Emphasis added.)

[68] The holding in *Viasystems* in respect of employers being vicariously liable for an employee's negligence was approved by the Supreme Court in *Various Claimants v Catholic Child Welfare Society and others* [2013] 2 AC 1 ('Various Claimants').

[69] Where the tortfeasor is an employee, it is not necessary for a claimant to meet the five features of the test promulgated in *Woodland* in order to establish a non-delegable duty of care.

[70] R2 was, at the material time, and still is an employee of PMC.

[71] Therefore, the question before this court should be whether vicarious liability should be imposed on R1 for R2's negligence, and not whether R1 owed a non-delegable duty of care towards the appellant and her mother, Puan Nursuharly.

[72] The criteria for imposing vicarious liability were one of the questions posed before the Federal Court in *Dr Kok Choong Seng & Anor v Soo Cheng Lin and another appeal* [2018] 1 MLJ 685; [2017] 10 CLJ 529; [2017] 6 AMR 609 ('Dr Kok Choong Seng'):

> (iii) Whether the criteria for imposing vicarious liability set out by Lord Phillips in the decision of the Supreme Court of UK in *Various Claimants v Catholic Child Welfare Society* [2013] 2 AC 1 and as further explained and elaborated by the Supreme Court of UK in *Cox v Ministry of Justice* [2016] AC 660 and *Mohamud v WM Morrison Supermarkets Plc* [2016] AC 677 applies in Malaysia?

[73] The Federal Court in *Dr Kok Choong Seng* answered the question in the affirmative. Raus Sharif CJ delivering the judgment of the Federal Court said:

> [90] With these modifications, we would adopt the stage 1 test in *Various Claimants* as elaborated upon in *Cox* and answer the third question in the affirmative in that respect. In relation to the stage 2 test in *Various Claimants* as explained in *Mohamud*, we note that the test is developed in the context of, and to cater for, intentional torts committed by employees. Since such an issue does not arise in the present case, we would leave open the question of the applicability of the stage 2 test at this juncture.

[74] The two-stage test in *Various Claimants* is, per Lord Phillips:

> ... in a case about vicarious liability, the focus was on two stages: (1) was there a true relationship of employer/employee between D2 and D1? (2) was D1 acting in the course of his employment when he committed the tortious act?

[75] Raus Sharif CJ in *Dr Kok Choong Seng*, summarised the *Various Claimants* two-stage test as follows:

> [74] In relation to stage 1, His Lordship identified a number of criteria which, when satisfied, 'give rise to policy reasons that make it fair, just and reasonable to impose vicarious liability on the employer':
>
> (a) the employer is more likely than the employee to have the means to compensate the victim, and can be expected to be insured;
>
> (b) the tort was committed as a result of the employee's activity done on behalf of the employer;
>
> (c) the employee's activity was part of the employer's business activity;
>
> (d) by employing the employee to carry on the activity, the employer has created the risk of the tort committed by the employee; and
>
> (e) the employee was under the control of the employer, to a greater or lesser degree. Since many skills in modern employment are not susceptible to direction, the significance of control is that the employer can direct what the employee does, not how he does it.
>
> ...
>
> [77] At stage 2, Lord Phillips found that the requirement for the tortious act to be done 'in the course of employment' would plainly be satisfied where the employee does negligently what he is employed to do ...

[76] In this present appeal, applying the five criteria in Stage 1 of the test promulgated by Lord Phillips in *Various Claimants*, as explained and elaborated in *Cox*, we are satisfied that all five criteria of Stage 1 are met for the following reasons:

(a) R1 is more likely to have the means than R2 to compensate the appellant, and R1 is expected to be insured;

(b) R2 had committed the tort in the course of her activity conducted on behalf of her employer. Puan Nursuharly did not choose R2 to treat her and to deliver her baby. She chose PMC, which is R1's hospital. R2 treated Puan Nursuharly and delivered the appellant on behalf of PMC and R1;

(c) R2's activity was part of PMC and R1's business activity;

(d) By employing R2 to carry out the activity of obstetrics and gynaecology, despite her lack of specialist qualifications in the field, PMC and R1 had created the risk of the tort of negligence committed by R2; and

(e) R2 was under the control of PMC and R1 pursuant to her contract of employment. R1 had directed R2 to carry out the activity of obstetrics and gynaecology at PMC.

[77] We further find that Stage 2 of the *Various Claimants* test is also satisfied: R2 had committed the tort of negligence in the course of employment — she had negligently done what she was employed to do. She had failed to provide advice and information regarding the delivery options available to the appellant's mother, including the associated risks and benefits of each option. She also failed to deliver the appellant without causing any injury to the appellant.

[78] As conceded by R2 during the trial, she did not provide the appellant's mother with any advice or information prior to undertaking the vacuum extraction. Her negligence in using excessive traction while undertaking the vacuum extraction in the presence of shoulder dystocia had caused the brachial plexus injury to the appellant.

[79] For these reasons, we find that R1 is vicariously liable for R2's negligence.

[80] Therefore, the High Court's decision that R1 and R2 are not liable for the brachial plexus injury suffered by the appellant is hereby overruled and set aside.

R1's claim for contribution and indemnity against R2

[81] R1 filed a claim for contribution and indemnity from R2. R1 in its statement of claim against R2 seeks full indemnity or contribution from R2 in the event this court holds R1 liable for R2's negligence.

[82] Learned counsel for R1 submitted that an employer may seek contribution from its negligent employee pursuant to s 10(1)(c) of the Civil Law Act 1956 (Act 67) ('the CLA 1956'). Section 10(1)(c) reads:

> Where damage is suffered by any person as a result of a tort (whether a crime or not) any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise, so, however, that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought.

[83] In support of its claim, R1 relied on the case of *Majlis Perbandaran Pulau Pinang v Lim Soo Seng* [1991] 1 MLJ 162; [1991] 1 CLJ 253. In that case, the issue of law was:

> if through a servant's negligence in the driving of a motor vehicle in the course of his employment on the highway, a third party is injured and sues the servant alone and

recovers damages, which the servant pays, may the servant in subsequent proceedings compel a reimbursement from the master.

[84] The Supreme Court held that a negligent employee cannot claim contributions from his employer. Harun Hashim SCJ delivering the judgment of the court expressly qualified the judgment, where he stated that the Supreme Court's opinions and judgment in that case were 'limited to cases arising out of the negligent acts of a servant in the driving of motor vehicles belonging to his employer and causing injury or death to third parties'.

[85] The case of *Majlis Perbandaran Pulau Pinang v Lim Soo Seng* is distinguishable from the facts of this present case. In that case, the employee was seeking contributions from his employer. Whereas, in this case, the employer (R1) is seeking contributions from the employee (R2).

[86] Furthermore, as stated by the Supreme Court, the judgment in *Majlis Perbandaran Pulau Pinang v Lim Soo Seng* is limited to negligent acts of an employee driving motor vehicles belonging to his employer and causing injury to third parties. The case does not apply to negligent acts of an employee delivering babies at the employer's hospital and causing injury to the babies or their mothers.

[87] Accordingly, we find that the Supreme Court's judgment in *Majlis Perbandaran Pulau Pinang v Lim Soo Seng* is not applicable in this present case.

[88] On the question of whether the R2 should indemnify or contribute to the damages payable by R1, for R2's negligent actions, our answer is no. Our reasons for answering the question in the negative are as follows:

(a) R1 as the employer who stands to generate profits from its employee's activities ought to bear the potential liability arising from that activity: see *Viasystems* at [55];

(b) the employer can spread the risk through pricing and insurance — it is better organised and able to bear the risk than the employee: see *Viasystems* at [55]; and

(c) deterrence of future harm by encouraging the employer, who has the relevant control over the employee, to take steps to reduce the risk of similar harm in the future: see *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd and another and another appeal* [2011] SGCA 22; [2011] 3 SLR 540 at [76].

[89] Accordingly, R1's claim for contribution and indemnity as prayed in para 13 of its statement of claim against R2 is dismissed.

QUANTUM

[90] The learned High Court judge stated in her judgment that the following quantum of damages should be awarded to the appellant if her claim had been allowed:

Special damages:

No	Items	RM
1	Hospital and medical expenses	7,652.40
2	Travelling expenses	4,470
3	Cost of medical supplies, equipment and appliances	73.50

Pre-trial damages:

No	Items	RM
1	Hospital and medical expenses	1,500
2	Travelling expenses	500

General damages:

No	Items	RM
1	Pain and suffering and loss of amenities for appellant's branchial plexus injury	75,000
2	Pain and suffering and loss of amenities of life for the repair surgery and scarring	3,850
3	Value of care given by family members	16,050

Future general damages:

No	Items	RM
1	Cost of a humeral external rotation osteotomy and lengthening with elongation nail surgery	15,000
2	Pain and suffering and loss of amenities of life for the repair surgery and loss of amenities	10,000
3	Cost of physiotherapy	100,800
4	Cost of occupational therapy	28,800
5	Cost of TheraBand	1,200
6	Cost of weights	1,200
7	Cost of hand putty	1,200
8	Cost of exercise ball	1,200
9	Cost of an arm sling	7,500

10	Cost of consultations with orthopaedic surgeon	16,800
11	Cost of occupational therapist	2,800

[91] The appellant's expert witness for quantum during the trial was Dr Aishah bt Ahmad Fauzi ('Dr Aishah'). She is a Consultant Rehabilitation Physician at University Malaya Specialist Medical Centre (UMSC). She had conducted a physical examination of the appellant on 25 January 2022 and produced her expert medical report on 9 February 2022. Her medical report was filed in as exh 'AAF1' in her affidavit affirmed on 10 May 2022.

[92] R2's expert witness for quantum was Dr Lydia bt Abdul Latif ('Dr Lydia'), who is a Consultant Rehabilitation Physician at ReGen Rehab Hospital. Dr Lydia had conducted a clinical examination on the appellant on 29 September 2021 and produced her expert medical report dated 5 November 2021, which was filed in court as exh 'LAL1' to her affidavit affirmed on 28 January 2022.

[93] Dr Aishah (PW4) testified in court during the trial. However, the respondents decided not to call Dr Lydia a day before she was scheduled to give evidence, which was on 24 June 2022. During the trial, the respondents did not give any explanation or reason for their decision not to call Dr Lydia. However, in R2's submissions in reply during the hearing of this appeal, counsel for R2 submitted that there was no need to call Dr Lydia as Dr Aishah had referred to Dr Lydia's expert report during her oral testimony in court and that she had agreed with most of what Dr Lydia had said in her report.

[94] The appellant's counsel had invited this court to draw an inference under s 114(g) of the Evidence Act 1950 against the respondents for their failure to call Dr Lydia as a witness during the trial. We do not see the necessity to do so in the circumstances. Reading the medical reports of both Dr Aishah and Dr Lydia, we find that they have both made similar recommendations for the appellant's future surgeries, therapies, and treatments.

Multiplier

[95] Both Dr Aishah and Dr Lydia agree that the appellant's life expectancy is 77 years. She was eight years old at the time of the trial.

[96] We agree that with the learned High Court judge that a reduction of 30% of life expectancy should be made for contingencies, and not 15% as suggested by the appellant's counsel. This court in *Medi-Circle Sdn Bhd v Nur Zulaikha bt Dzulzaili (suing through her father and litigation representative,*

Dzulzaili bin Muhammad Nor) and other appeals [2022] MLJU 1575; [2022] CLJU 1546; [2022] AMEJ 0961 held the multiplier should be the appellant's life expectancy minus her age at the time of trial less 30% for contingencies and accelerated payment.

[97] We find that the learned High Court judge was correct to hold the award of damages should be calculated on a multiplier of 48 years (77 years minus eight years less 30%).

Special damages, pre-trial damages, general damages, and aggravated damages

[98] We find that the amounts awarded by the High Court judge in respect of special damages, pre-trial damages and general damages to be fair and reasonable; hence, do not merit appellate intervention.

[99] Based on the earlier decisions of this court in *Elizabeth Chin Yew Kim & Anor v Dato' Ong Gim Huat (sued as public officer of Hospital Lam Wah Ee) and other appeals* [2017] 1 MLJ 328; [2017] 2 CLJ 274; and *Dr Premitha Damodaran v GTK (a child suing through her father and litigation representative, Taranjeet Singh a/l Bhagwan Singh) & Anor and another appeal* [2022] 3 MLJ 484; [2022] 3 CLJ 797; [2021] AMEJ 215, we do not see any reason to disturb the High Court's award of RM75,000 for general damages for pain and suffering and loss of amenities for brachial plexus injury. We also see no reason to interfere with the award of general damages in the sum of RM3,850 for the repair surgery that the appellant underwent at the age of two years.

[100] Further, we agree with the learned High Court judge that based on the facts of this case, there are no grounds for awarding aggravated damages against the respondents.

Future general damages

[101] After considering the recommendations of both Dr Aishah and Dr Lydia in their expert medical reports, and Dr Aishah's oral testimony, our views as regards the quantum of future damages claimed by the appellant are as follows:

(a) humeral external rotation osteotomy and lengthening with elongation nail:

(i) Dr Aishah's proposal of RM15,000 to RM20,000 was an estimate. There is no supporting evidence as to how much the surgery would cost; and

(ii) we do not see any reason to disturb the High Court's award of award of RM15,000, which is within the range proposed by Dr Aishah.

(b) contracture release surgery:

(i) Dr Aishah testified that the risk of contracture recurrence could occur as early as between three to five years. However, she said this does not mean that the appellant would have to go through contracture release surgery every five years. This is because it depends on how the appellant complies with home based therapy. While there is a risk of contracture recurrence, it is less likely if therapy is followed; and

(ii) since the appellant's expert's view is that the risk of contracture recurrence is less likely, if the appellant complies with the therapies, we have decided not to award any damages for contracture release surgery.

(c) medications:

(i) the medications claimed by the appellant are painkillers;

(ii) the appellant's expert did not recommend any medications; and

(iii) therefore, no damages are awarded for painkillers.

(d) cost of therapies:

Counsel for the respondents submitted the appellant cannot be awarded damages for both contracture release surgery and the cost of therapy: it is either damages for contracture release surgery or for the cost of therapy.

As we have decided not to award damages for contracture release surgery, we are awarding the costs of therapy to the appellant.

(i) physiotherapy:

(1) Dr Aishah recommended that the appellant goes for physiotherapy once a month to once in three months;

(2) Dr Lydia recommended that the appellant goes for physiotherapy once a week;

(3) Dr Aishah's estimated costs for each session of physiotherapy are between RM150 to RM200. Dr Lydia's is between RM120 to RM160; and

(4) the sum of RM345,600 (RM150 x 4 sessions x 12 months x 48 years) is awarded for the cost of physiotherapy.

(ii) occupational therapy:

(1) Dr Aishah recommended the appellant undergoes occupational

therapy between once a month to once in three months;

(2) Dr Lydia recommended the appellant undergoes occupational therapy twice a month;

(3) Dr Aishah's estimated costs for each session of occupational therapy is between RM150 to RM200. Dr Lydia's estimated costs is between RM120 to RM160; and

(4) The sum of RM34,560 (RM180 x 4 times per year x 48 years) is awarded for the cost of occupational therapy.

(e) cost of equipment and replacement:

(i) TheraBand:

(1) Dr Aishah estimated the cost of replacement of the TheraBand to be between RM50 to RM100 once a year if used daily;

(2) Dr Lydia recommended the use of TheraBand but did not provide an estimated cost of replacement; and

(3) we agree with the sum of RM1,200 (RM50 every two years for 48 years) awarded by the High Court for the cost of replacement of the TheraBand.

(ii) weights:

(1) Dr Aishah estimated the cost of replacement of the weights to be between RM50 to RM100 once a year if used daily;

(2) Dr Lydia recommended the use of weights but did not provide an estimated cost of replacement.; and

(3) we agree with the sum of RM1,200 (RM50 every two years for 48 years) awarded by the High Court for the cost of replacement of the weights.

(iii) hand putty:

(1) Dr Aishah estimated the cost of replacement of the hand putty to be between RM50 to RM100 once a year if used daily;

(2) Dr Lydia recommended the use of hand putty but did not provide an estimated cost of replacement; and

(3) we agree with the sum of RM1,200 (RM50 every two years for 48 years) awarded by the High Court for the cost of replacement of the hand putty.

(iv) exercise ball:

(1) Dr Aishah estimated the cost of replacement of the exercise ball to

be between RM50 to RM100 once a year if used daily;

(2) Dr Lydia recommended the use of an exercise ball but did not provide an estimated cost of replacement; and

(3) we agree with the sum of RM1,200 (RM50 every two years for 48 years) awarded by the High Court for the cost of replacement of the exercise balls.

(v) X-Box (virtual reality):

(1) Dr Lydia suggested virtual reality such as Xbox for the appellant to be more engaging with her therapy at home;

(2) Dr Aishah did not address the need for virtual reality as part of the appellant's therapy in her expert report. When asked during the trial, Dr Aishah said that it can be X-Box, Nintendo, or any virtual reality games that is available in the market; and

(3) based on Dr Aishah's testimony, we are not convinced that the purchase of an X-Box and its replacements for 48 years is necessarily required as an equipment for the appellant's therapy. Therefore, no damages are awarded for the costs of an X-Box.

(vi) arm sling:

(1) Dr Aishah estimated the cost of replacement of the arm sling to be between RM100 to RM200 once or twice a year if used daily;

(2) Dr Lydia recommended the use of an arm sling but did not provide an estimated cost of replacement; and

(3) we agree with the sum of RM7,500 awarded by the High Court for the cost of replacement of the arm sling.

(vii) splint/orthosis:

(1) Dr Aishah estimated the cost of replacement of the splint/orthosis to be between RM100 to RM200 once or twice a year if used daily;

(2) Dr Lydia recommended the use of splint/orthosis but did not provide an estimated cost of replacement; and

(3) the sum of RM7,200 (RM150 per year x 48 years) is awarded for the cost of replacement of the splint/orthosis.

(viii) modified cutleries:

(1) Dr Aishah estimated the cost of replacement of the modified cutleries to be between RM100 to RM200 once or twice a year if used daily;

(2) Dr Lydia recommended the use of modified cutleries but did not

provide an estimated cost of replacement; and

(3) no damages are awarded for modified cutleries. We are of the view that the appellant does not require modified cutleries to feed herself. Dr Aishah testified that the appellant is independent in feeding. Dr Lydia also stated in her expert report that the appellant is independent with her feeding.

(ix) custom-fit athletic arm sling:

(1) both Dr Aishah and Dr Lydia recommended custom-fit arm sling for use when playing sports. However, neither doctor provided an estimate of the costs of replacement for this custom-fit arm sling;

(2) the appellant asked for the sum of RM9,000 being RM300 every two years for 59 years. Whereas, both respondents submitted that the sum of RM2,500 is sufficient as this custom-fit athletic arm sling will used only when playing sports; and

(3) we agree with the respondents and award the sum of RM2,500 for the cost of replacement of the custom-fit athletic arm sling

(x) ergonomic pen:

(1) Dr Aishah did not address the need for an ergonomic pen in her expert report. Dr Lydia recommended it but did not provide any estimated cost for the ergonomic pen.; and

(2) no damages are awarded for ergonomic pens. We do not see the need for an ergonomic pen since the appellant has complete use of her right hand. Dr Aishah testified that the appellant has a 'good right hand'.

(xi) modifications and adaptations to vehicle:

(1) both Dr Aishah and Dr Lydia did not state the need for modification and adaptation of vehicle in their expert medical reports;

(2) Dr Aishah mentioned it during her oral evidence and estimated the cost to be between RM2,000 and RM5,000. However, Dr Aishah testified that the appellant would be able to drive as she has a 'good right hand'; hence, she did not make any recommendations for modification and adaptation to the vehicle; and

(3) no damages are awarded for modification and adaptation of vehicle.

(f) cost of medical consultations:

(i) orthopaedic surgeon:

(1) both Dr Aishah and Dr Lydia are of the view that the appellant's condition and the type of orthopaedic surgical intervention are best assessed by an orthopaedic surgeon (hand and microsurgery);

(2) Dr Aishah estimated the frequency of follow-up is yearly with a cost of RM30 at a government hospital and the cost of follow-up in a private hospital to be between RM250 for initial consultation and RM100 to RM200 for subsequent consultations. Dr Lydia did not provide any estimated costs;

(3) the appellant asked for damages in the sum of RM11,850 (RM250 plus RM200 per year for 58 years);

(4) the respondents submitted that the sum of damages awarded should be RM8,400 (RM175 per session per year x 48 years);

(5) damages in the sum of RM8,400 is awarded for the costs of medical consultations with an orthopaedic surgeon.

(ii) rehabilitation physician:

(1) both Dr Aishah and Dr Lydia state that it is important that for the appellant to have regular rehabilitation follow-ups;

(2) Dr Aishah estimated the frequency of follow-up is yearly with a cost of RM30 at a government hospital and the cost of follow up in a private hospital to be between RM250 for initial consultation and RM100 to RM200 for subsequent consultations. Dr Lydia did not provide any estimated costs;

(3) the respondents submitted that the sum of damages awarded should be RM8,400 (RM175 per session per year x 48 years); and

(4) damages in the sum of RM8,400 is awarded for the costs of medical consultations with a rehabilitation physician.

(iii) paediatrician:

(1) Dr Aishah did not address the need for the appellant to see a paediatrician in her expert report. However, during her oral testimony, Dr Aishah testified that it is best for her to see a paediatrician until adolescence;

(2) Dr Aishah estimated the frequency of follow-up is twice yearly with cost in a private hospital to be between RM250 to RM300 for initial consultation and RM150 to RM200 for subsequent consultations;

(3) Dr Lydia said that the appellant needs to be seen by a paediatrician but did not provide any estimated cost for seeing a paediatrician;

(4) the appellant asks for cost of RM4,300 (RM300 for first visit and

RM400 per year for ten years). The respondents submit that there is no need to factor in the costs of visits to a paediatrician because it is required by all children in any event; and

(5) damages in the sum of RM1,650 (RM250 for one year plus RM175 for eight years) for the cost of visits to a paediatrician until the appellant is 18 years.

(iv) clinical psychologist:

(1) Dr Aishah in her oral testimony said that low self-esteem is part of the psychosocial implications of brachial plexus injury. She said that a clinical psychologist's assessment will be very useful to address what are the core issues and what are the interventions that can be done. It can also assist the appellant's teachers at school as to how to handle a child with brachial plexus injury;

(2) Dr Aishah estimated the cost of seeing a clinical psychologist is between RM200 to RM500 per session;

(3) Dr Lydia stated in her expert report that the appellant is required to see a clinical psychologist once a week. She estimated the cost per session to be between RM180 to RM550;

(4) despite the recommendation made by the respondents' expert Dr Lydia that the appellant see a clinical psychologist once a week, counsel for the appellant conceded that it is more reasonable for the appellant to see a clinical psychologist once every six months; and

(5) damages in the sum of RM48,000 (RM500 x 2 times per year x 48 years) is awarded for the appellant's costs of medical consultations with a clinical psychologist.

[102] For the reasons above, based on the available evidence and the expert opinions of both Dr Aishah and Dr Lydia, we find that the High Court judge fell into error in calculating the quantum of future general damages; thus, warranting appellate intervention.

[103] Our award of future general damages to the appellant is set out in the table below:

No	Items	Award
Costs of Future Surgeries		
1	Humeral external rotation osteotomy and lengthening with elongation nail	RM15,000
2	Contracture release surgery	NIL
3	Medications	NIL
Therapies		

4	Physiotherapy	RM345,600
5	Occupational therapy	RM34,560
Costs of Equipment and Replacement		
6	TheraBand	RM1,200
7	Weights	RM1,200
8	Hand putty	RM1,200
9	Exercise ball	RM1,200
10	X-box (virtual reality)	NIL
11	Arm Sling	RM7,500
12	Splint/Orthosis	RM7,200
13	Modified cutleries	NIL
14	Custom fit athletic arm sling	RM2,500
15	Ergonomic pen	NIL
16	Modifications and adaptations to vehicle	NIL
Costs of Medical Consultations		
17	Orthopaedic surgeon	RM8,400
18	Rehabilitation physician	RM8,400
19	Paediatrician	RM1,650
20	Clinical psychologist	RM48,000

DECISION

[104] For the reasons discussed above, the appellant's appeal on liability is allowed. The decision of the High Court in respect of liability is set aside.

[105] R1 is vicariously liable for R2's negligence.

[106] R1's claim for contribution and indemnity against R2 is dismissed.

[107] The appellant's appeal on quantum is partly allowed in respect to quantum for future general damages. The judgment sum is to be varied accordingly.

[108] Interests on special damages, pre-trial damages, general damages, and the judgment sum are at the rate and for the period ordered by the High Court.

[109] Costs of RM100,000 against R1 here and below and costs of RM50,000 against R2 here and below. All costs awarded are subject to allocatur.

Order accordingly.

Reported by Ashok Kumar